

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE,

Plaintiff,

v.

KATHLEEN ALLISON, et al.,

Defendants.

No. 2:20-cv-02482 WBS AC

ORDER RE: DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

COUNTY OF AMADOR, a public
agency of the State of
California,

Plaintiff,

v.

KATHLEEN ALLISON, et al.,

Defendants.

-----oo0oo-----

Plaintiffs California Sportfishing Protection Alliance
("CSPA") and County of Amador ("Amador") brought this now-
consolidated action against Kathleen Allison, in her official

1 capacity as Secretary of the California Department of Corrections
2 and Rehabilitation ("CDCR"), and Patrick Covello, in his official
3 capacity as Warden of CDCR's Mule Creek State Prison
4 (collectively "defendants"), seeking declaratory and injunctive
5 relief for alleged violations of the Clean Water Act, as amended
6 by the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et
7 seq. (See CSPA Compl. (Docket No. 1); Amador First Amended
8 Complaint ("Amador FAC") (Docket No. 35); Order Consolidating
9 Cases (Docket No. 18).)

10 The court previously granted in part plaintiffs' motion
11 for partial summary judgment (Order Re: Motion for Partial Summ.
12 J. ("Order Re: Pls.' MSJ") (Docket No. 60)) and denied
13 defendants' motion for partial summary judgment on the issue of
14 Amador's statutory standing (Docket No. 92). The court does not
15 recite a full background of the case as it has done so in its
16 prior order. (See Order Re: Pls.' MSJ at 2-5.)¹ Defendants now
17 move for summary judgment on all claims. (Defs.' Mot. for Summ.
18 J. ("Mot.") (Docket No. 95).)

19 I. Judicial Notice

20 A court may take judicial notice of facts "not subject
21 to reasonable dispute" because they are either "(1) generally
22 known within the territorial jurisdiction of the trial court or
23 (2) capable of accurate and ready determination by resort to
24 sources whose accuracy cannot reasonably be questioned." Fed. R.

25
26 ¹ The court notes that its prior order (Docket No. 60)
27 erroneously stated that the plaintiffs filed a single, joint
28 complaint. There are two operative complaints: CSPA's Complaint
(Docket No. 1) and Amador's First Amended Complaint (Docket No.
35.)

1 Evid. 201.

2 Defendants and Amador request that the court take
3 judicial notice of various documents from the Central Valley
4 Regional Water Quality Control Board, the State Water Resources
5 Control Board, and the U.S. Environmental Protection Agency.
6 (See Docket Nos. 95-6, 97-3.) The court will take judicial
7 notice of these materials. See Daniels-Hall v. Nat'l Educ.
8 Ass'n, 629 F.3d 992, 998-99 (9th Cir. 2010) (a court may take
9 judicial notice of "information [that] was made publicly
10 available by government entities" where "neither party disputes
11 the authenticity . . . or the accuracy of the information"); Mack
12 v. S. Bay Beer Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir.
13 1986), abrogated on other grounds, Astoria Fed. Sav. & Loan Ass'n
14 v. Solimino, 501 U.S. 104 (1991) ("[A] court may take judicial
15 notice of 'records and reports of administrative bodies.'")
16 (citations omitted).

17 II. Legal Standard

18 Summary judgment is proper "if the movant shows that
19 there is no genuine dispute as to any material fact and the
20 movant is entitled to judgment as a matter of law." Fed. R. Civ.
21 P. 56(a). A party may move for summary judgment either for one
22 or more claims or defenses, or for portions thereof. Id. Where
23 a court grants summary judgment only as to a portion of a claim
24 or defense, it "may enter an order stating any material fact . .
25 . that is not genuinely in dispute and treating the fact as
26 established in the case." Id. at 56(g).

27 A material fact is one "that might affect the outcome
28 of the suit under the governing law," and a genuine issue is one

1 that could permit a reasonable trier of fact to enter a verdict
2 in the non-moving party's favor. Anderson v. Liberty Lobby,
3 Inc., 477 U.S. 242, 248 (1986). The moving party bears the
4 initial burden of establishing the absence of a genuine issue of
5 material fact and may satisfy this burden by presenting evidence
6 that negates an essential element of the non-moving party's case.
7 See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

8 Alternatively, the movant may demonstrate that the non-moving
9 party cannot provide evidence to support an essential element
10 upon which it will bear the burden of proof at trial. Id. The
11 burden then shifts to the non-moving party to set forth specific
12 facts to show that there is a genuine issue for trial. See id.
13 at 324. Any inferences drawn from the underlying facts must,
14 however, be viewed in the light most favorable to the non-moving
15 party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
16 475 U.S. 574, 587 (1986).

17 III. Discussion

18 A. Unpermitted Discharges

19 Both plaintiffs' first claims allege unpermitted
20 discharges to Mule Creek. According to defendants' motion, these
21 claims "contend that Defendants have violated the Clean Water Act
22 by operating the LAAs [land application areas]" because "the
23 spraying of treated wastewater to the land surface is the
24 functional equivalent of a discharge to water of the United
25 States" ² (Mot. at 17.) However, defendants

26 ² Where the addition of pollutants to waters of the
27 United States via a nonpoint source is the "functional equivalent
28 of a direct discharge from the point source," the discharger must
obtain a permit pursuant to the Clean Water Act. County of Maui

1 mischaracterize both plaintiffs' claims. CSPA's first claim
2 applies only to the land application areas but does not rely on a
3 theory of functional equivalence. (See CSPA Compl. ¶¶ 80-93.)
4 Amador's first claim relies on the functional equivalence theory
5 but is not limited to the land application areas. (See Amador
6 FAC ¶¶ 80-87.)

7 Defendants' motion addresses only the functional
8 equivalence theory, upon which CSPA does not rely. (See Mot. at
9 17-18.) Defendants' reply asserts in a footnote that "other than
10 supposition from the Regional Water Board's enforcement staff,
11 CSPA has not produced any evidence (i.e., sampling data) to
12 support [its] unfounded claim" that defendants' operation of the
13 land application areas resulted in a discharge to Mule Creek.
14 (Defs.' Reply (Docket No. 100) at 1 n.2.) Because defendants
15 provide neither citations nor further discussion to support this
16 argument, defendants have not provided sufficient basis on which
17 to grant summary judgment. Accordingly, the court will deny
18 summary judgment on CSPA's first claim.

19 Amador indicates that it "will no longer pursue" its
20 first claim as to the land application areas. (Amador Opp'n at
21 8.) The court will therefore grant defendants' motion for
22 summary judgment on Amador's first claim, only to the extent it
23 alleges violations resulting from operation of the land
24 application areas.

25 B. Violations of Small MS4 Permit

26 Plaintiffs' second claims allege multiple violations of
27

28 v. Hawaii Wildlife Fund, 140 S. Ct. 1462, 1468 (2020).

1 the Small MS4 Permit.³ Both plaintiffs allege violations of
 2 Provisions B.1, B.2, and D. CSPA additionally alleges violation
 3 of Provision B.3, and Amador alleges violation of Provision C.1.
 4 (See CSPA Compl. ¶¶ 94-112; Amador FAC ¶¶ 104-112.)

5 Courts interpret and enforce NPDES permits “like any
 6 other contract.” Nat. Res. Def. Council, Inc. v. County of Los
 7 Angeles (“NRDC II”), 725 F.3d 1194, 1204 (9th Cir. 2013). If the
 8 language of the permit “is plain and capable of legal
 9 construction, the language alone must determine the permit’s
 10 meaning.” Id. at 1204-05 (quoting Piney Run Pres. Ass’n v. Cnty.
 11 Comm’rs of Carroll Cnty., MD, 268 F.3d 255, 270 (4th Cir. 2001)).

12 1. Sufficiency of Data

13 Defendants argue that plaintiffs lack sufficient data
 14 to prove any violation of the Small MS4 Permit because plaintiffs
 15 rely largely on data from the discharge sampling points denoted
 16 MCSP5 and MCSP6. Defendants assert that MCSP5 and MCSP6 do not
 17 discharge to Mule Creek. (Mot. at 19.) However, as the court
 18 found in its previous order, there is a question of fact as to
 19 whether the sampled discharges from MCSP5 and MCSP6 reached Mule
 20 Creek. (See Order Re: Pls.’ MSJ at 21; see also, e.g., CSPA Ex.
 21 9-10, MCSP Discharge Notifications (Docket No. 96-2 at 165-68)
 22 (notifying regional water board of discharges to Mule Creek from

23 ³ The term “MS4”—an abbreviation for “municipal separate
 24 storm sewer system”—refers to Mule Creek State Prison’s
 25 stormwater collection system, “which is composed of a variety of
 26 conveyances (such as drains, ditches, swales, and outfalls) that
 27 operate to channel storm water away from the facility, toward
 28 Mule Creek.” (Order Re: Pls.’ MSJ at 2.) The regional water
 board issued the Small MS4 Permit under the Clean Water Act’s
 National Pollutant Discharge Elimination System (“NPDES”). (Id.
 at 3.)

1 MCSP5 and MCSP6.)⁴

2 2. Provision B.1

3 Both plaintiffs allege violation of Provision B.1,
4 which states: "Discharges of waste from the MS4 that are
5 prohibited by Statewide Water Quality Control Plans or applicable
6 Regional Water Quality Control Plans (Basin Plans) are
7 prohibited." (Defs. Ex. A, State Water Res. Ctrl. Bd. Water
8 Quality Order No. 2013-001-DWQ, NPDES Gen. Permit No. CAS000004
9 ("Small MS4 Permit") (Docket No. 95-7 at 1-114) § B.1.)

10 The Small MS4 Permit contains "discharge prohibitions"
11 and "effluent limitations" that regulate the quality of
12 defendants' discharges. (See id. §§ B.1-D.) Provision B.1 is
13 one such discharge prohibition. (Id. § B.1.) In contrast, the
14 permit's "receiving water limitations" require that defendants'
15 discharges not "cause or contribute" to an exceedance of Basin
16 Plan water quality standards in the receiving water. (Id. § D.)

17 Plaintiffs argue that defendants' discharges exceeded
18 the Basin Plan's water quality standards. (CSPA Opp'n at 31-35;
19 Amador Opp'n at 23-25.) However, Provision B.1--a discharge
20 limitation--does not incorporate the water quality standards,
21 only the Basin Plan's waste prohibitions. (See Small MS4 Permit
22 § B.1.) While the receiving water limitations explicitly

23
24 ⁴ Plaintiffs also argue that there is (1) post-complaint
25 data from MCSP2 and MCSP3 and (2) pre-complaint data showing a
26 "continuing likelihood of a recurrence in intermittent or
27 sporadic violations" under Gwaltney of Smithfield v. Chesapeake
28 Bay Foundation, 484 U.S. 49 (1987). The court need not address
these points because the existence of a question of fact as to
whether the samples from MCSP5 and MCSP6 discharged to Mule Creek
requires denial of summary judgment.

1 incorporate the Basin Plan's water quality standards, Provision
2 B.1 does not, nor do any other discharge prohibitions or effluent
3 limitations. (See id. §§ B.1-D.)

4 It appears that the regional water board purposely
5 excluded the water quality standards from the permit's discharge
6 limitations, as water quality standards apply only to receiving
7 waters (i.e., waters of the United States), not to discharges.
8 The Basin Plan's "[water quality] objectives . . . are intended
9 to govern the levels of constituents and characteristics in the
10 main water mass unless otherwise designated," and "may not apply
11 at or in the immediate vicinity of effluent discharges"
12 (See Cent. Valley Reg'l. Water Quality Ctrl. Bd., Water Quality
13 Ctrl. Plan (Feb. 2019) ("Basin Plan") (Docket No. 95-7 at 545-
14 1006) at 3-2; see also Small MS4 Permit ¶ 40 (equating "water
15 quality standards" with "receiving water limitations" and stating
16 that permittees "achiev[e] the water quality standards in the
17 receiving water").)

18 The application of water quality standards exclusively
19 to receiving waters is consistent with statutory, regulatory, and
20 Ninth Circuit authority. See 33 U.S.C. § 1313(c)(2)(A) ("water
21 quality standards shall consist of the designated uses of the
22 navigable waters involved and the water quality criteria for such
23 waters" (emphasis added); 40 C.F.R. § 131.3 ("Water quality
24 standards are provisions of State or Federal law which consist of
25 a designated use or uses for the waters of the United States and
26 water quality criteria for such waters based upon such uses.")
27 (emphasis added); Nat. Res. Def. Council, Inc. v. County of Los
28 Angeles ("NRDC I"), 673 F.3d 880, 885, 887 (9th Cir. 2011), rev'd

1 on other grounds, Los Angeles Cnty. Flood Control Dist. v. Nat.
2 Res. Def. Council, Inc., 568 U.S. 78 (2013) (distinguishing
3 between “effluent limitations” and “water quality standards” and
4 explaining that “the regional boards’ water quality plans, called
5 ‘basin plans,’ must address the beneficial uses to be protected
6 as well as water quality objectives . . .”) (internal quotation
7 marks omitted).

8 Defendants correctly point out that Provision B.1
9 refers to wastes specifically prohibited by the Basin Plan. (See
10 Small MS4 Permit § B.1.) Such waste prohibitions and other
11 discharge requirements are contained within various Basin Plan
12 amendments (which are listed on unnumbered pages at the beginning
13 of the plan). (See Basin Plan.) For example, Amendment 11
14 contains a “prohibition of waste discharge from leaching and
15 percolation systems within the Anderson-Cottonwood Irrigation
16 District,” and Amendment 24 contains a “prohibition of waste
17 discharge from individual disposal systems in the Chico Urban
18 Area.” (Id.) Plaintiffs have not identified, nor has the court
19 found, any Basin Plan amendment--or any other provision of the
20 Basin Plan--with a discharge prohibition that applies to
21 defendants.

22 Defendants have therefore established that plaintiffs
23 cannot demonstrate a violation of Provision B.1. Accordingly,
24 the court will grant partial summary judgment for defendants on
25 plaintiffs’ second claims to the extent that they allege
26 violations of Provision B.1 of the Small MS4 Permit.

27 3. Provision B.2

28 Both plaintiffs allege violations of Provision B.2,

1 which provides: "Discharges of storm water from the MS4 to waters
2 of the U.S. in a manner causing or threatening to cause a
3 condition of pollution or nuisance as defined in Water Code §
4 13050 are prohibited." (Small MS4 Permit § B.2.) The California
5 Water Code defines pollution as "an alteration of the quality of
6 the waters of the state by waste to a degree which unreasonably
7 affects either of the following: (A) The waters for beneficial
8 uses. (B) Facilities which serve these beneficial uses." Cal.
9 Water Code § 13050(1)(1).

10 Defendants argue that plaintiffs are unable to
11 establish a violation of Provision B.2 because Mule Creek has not
12 been included on the State Water Board's Section 303(d) list,
13 which identifies "impaired waterbodies." (See Defs.' Separate
14 Statement of Undisputed Facts ("Defs.' SUF") (Docket No. 95-2) ¶
15 51.) Based on this fact, defendants contend, plaintiffs cannot
16 prove that Mule Creek's beneficial uses were affected. (Mot. at
17 24-25.) However, the plain language of Provision B.2 does not
18 require plaintiffs to proffer such evidence. The provision
19 states that the discharges must "caus[e] or threaten[] to cause a
20 condition of pollution or nuisance" (Small MS4 Permit §
21 B.2 (emphasis added).) Based on the permit's language, evidence
22 relating to whether the discharges actually impaired a beneficial
23 use of Mule Creek is not necessary to find a violation under
24 Provision B.2; it would be sufficient to prove that the
25 discharges merely threatened to impair a beneficial use. (See
26 id.)

27 Defendants' only other argument concerning Provision
28 B.2 is premised on their contention that MCSP5 and MCSP6 did not

1 discharge to Mule Creek. (See Mot. at 25.) As stated above, a
2 question of fact exists as to that issue. Accordingly, the court
3 will deny summary judgment as to plaintiffs' second claims to the
4 extent they allege violations of Provision B.2 of the Small MS4
5 Permit.

6 4. Provision B.3

7 CSPA's second claim alleges violation of Provision B.3,
8 which states in relevant part: "Discharges through the MS4 of
9 material other than storm water to waters of the U.S. shall be
10 effectively prohibited, except as allowed under this Provision or
11 as otherwise authorized by a separate NPDES permit." (Small MS4
12 Permit § B.3 (emphasis added).)

13 a. Effectively Prohibit and Maximum Extent
14 Practicable Standards

15 Defendants argue that CSPA is unable to establish a
16 violation of Provision B.3 because defendants have used "best
17 efforts" to prevent non-stormwater from discharging through the
18 MS4, in compliance with the "maximum extent practicable"
19 standard. (Mot. at 26-27.) Relying on Defenders of Wildlife v.
20 Browner, 191 F.3d 1159 (9th Cir. 1999), defendants seem to argue
21 that "maximum extent practicable" is the standard imposed by all
22 municipal permit provisions. This argument incorrectly equates
23 Provision D's "effectively prohibit" standard with the maximum
24 extent practicable standard, misconstruing not only the permit
25 language, but also the Clean Water Act and Ninth Circuit
26 authority.

27 The Act provides in relevant part: "Permits for
28 discharges from municipal storm sewers . . . (ii) shall include a

1 requirement to effectively prohibit non-stormwater discharges
2 into the storm sewers; and (iii) shall require controls to reduce
3 the discharge of pollutants to the maximum extent practicable . .
4 . .” 33 U.S.C. § 1342(p)(3)(B) (emphasis added). The language
5 of the Act clearly treats the requirement to effectively prohibit
6 non-stormwater discharges as distinct from the requirement to
7 implement pollution controls to the maximum extent practicable.
8 See id. The Small MS4 Permit similarly treats these as separate
9 requirements. (Compare Small MS4 Permit § B.3 with id. § C.1.)

10 The court declines to adopt defendants’ interpretation,
11 which would render § 1342(p)(3)(B)(ii) and Provision B.3
12 superfluous. See Browner, 191 F.3d at 1165 (“This court
13 generally refuses to interpret a statute in a way that renders a
14 provision superfluous.”) (quoting Government of Guam ex rel. Guam
15 Econ. Dev. Auth. v. United States, 179 F.3d 630, 634 (9th Cir.
16 1999)); NRDC II at 1206 (“[a] court must give effect to every
17 word or term in an NPDES permit and reject none as meaningless or
18 surplusage”) (quoting In re Crystal Props., Ltd., 268 F.3d 743,
19 748 (9th Cir. 2001)) (alterations adopted).

20 Browner does not support defendants’ interpretation of
21 Provision B.3. Browner dealt with a purported conflict between §
22 1342(p)(3)(B)(iii), requiring controls to reduce pollutants to
23 the maximum extent practicable, and § 1311(b)(1)(C), a provision
24 not at issue here that requires certain permits to mandate strict
25 compliance with state water-quality standards. See 191 F.3d at
26 1164. The Browner court held that Congress did not intend to
27 require municipalities to comply with § 1311(b)(1)(C) because
28 that interpretation would render the maximum extent practicable

1 standard at § 1342(p)(3)(B)(iii) superfluous. See id. at 1165-
2 66. The court did not discuss the separate requirement that
3 permits effectively prohibit non-stormwater discharges and did
4 not hold that all municipal permit provisions apply the maximum
5 extent practicable standard. See id. at 1164-67. On the
6 contrary, the Ninth Circuit has indicated that "maximum extent
7 practicable" is not "the exclusive measure that may be applied to
8 municipal storm sewer discharges," but rather, a regulatory
9 agency may require a discharger to exceed that standard. See
10 NRDC I at 897 (quoting Bldg. Indus. Ass'n of San Diego Cnty. v.
11 State Water Res. Control Bd., 124 Cal. App. 4th 866 (4th Dist.
12 2004)).

13 Defendants have not cited any authority indicating that
14 the court should merge Provision D's effective prohibition of
15 non-stormwater discharges with the maximum extent practicable
16 standard. Accordingly, the court will deny summary judgment on
17 CSPA's second claim as to Provision B.3 based on defendants'
18 purported compliance with the maximum extent practicable
19 standard. Cf. San Francisco Baykeeper v. City of Sunnyvale, No.
20 5:20-cv-00824 EJD, 2020 WL 7696078, at *7 (N.D. Cal. Dec. 28,
21 2020) (rejecting argument that municipality's implementation of a
22 program to prevent illicit connections and discharges satisfied
23 MS4 permit provision "effectively prohibit[ing] the discharge of
24 non-stormwater" as a matter of law). And even if the maximum
25 extent practicable standard did govern Provision D, there is a
26 question of fact as to whether defendants met that standard, as
27 discussed below.

28 b. Sufficiency of Data

1 Defendants also present arguments concerning the data
2 CSPA relies on. CSPA tested samples from the MS4 and found
3 pharmaceuticals and caffeine. (CSPA Ex. 29, Expert Op. Report of
4 Robert W. Emerick ("Emerick Report") (Docket No. 96-5 at 51-70)
5 at 15.) Defendants argue that CSPA's pharmaceutical and caffeine
6 sampling data is insufficient to demonstrate a violation. They
7 contend that because CSPA's experts collected samples from ponded
8 water during dry weather and not during a Significant Rain Event,
9 CSPA will be unable to establish that those samples reached Mule
10 Creek. (Mot. at 26.) CSPA's expert Dr. Emerick opined that if
11 pharmaceuticals and caffeine were "observed in stormwater
12 originating from the Mule Creek Prison complex, it is reasonable
13 to suggest that there is some contribution of sewage in the
14 stormwater." (Emerick Report at 8.) Dr. Emerick also explained
15 that it is possible for wastewater to enter the storm drain via
16 underground exfiltration, and that during his site visit, "[i]t
17 was evident that there had been a recent discharge" despite the
18 dry conditions. (Id. at 8-9, 11.) This evidence creates a
19 question of fact as to whether the samples containing
20 pharmaceuticals and caffeine discharged through the MS4 despite
21 the dry weather.

22 Defendants next argue that CSPA cannot prove that
23 sewage was present in the stormwater because the stormwater did
24 not contain high levels of ammonia. Defendants point to the
25 testimony of regional water board employee Elizabeth Lee, who
26 stated that she would expect to observe ammonia levels "in the
27 hundreds, maybe even thousands" for "true wastewater," while the
28 data revealed an ammonia level of "less than 0.20." (Dep. of

1 Elizabeth Lee (Docket No. 95-3 at 169-91) at 137-38.) CSPA
2 points to Dr. Emerick's testimony that while ammonia is one
3 factor engineers analyze, ammonia is "not a reliable indicator"
4 of the presence of sewage in stormwater. (Dep. of Dr. Robert
5 Emerick (Docket No. 96-5 at 71-97) at 56-57.) This evidence
6 establishes a dispute of material fact as to whether the ammonia
7 testing data proves that sewage was not present in the
8 stormwater.

9 Finally, defendants argue that there is no evidence of
10 "commingling" of stormwater and non-stormwater. (Mot. at 27.)
11 However, the court found in its previous order that there is
12 conflicting evidence that "creates a genuine dispute of material
13 fact as to whether defendants are violating [P]rovision B.3 based
14 on alleged cross-contamination [of stormwater] from the sanitary
15 sewer system." (Order Re: Pls.' MSJ at 21-23.)

16 Accordingly, the court will deny summary judgment as to
17 CSPA's second claim to the extent it alleges violations of
18 Provision B.3 of the Small MS4 Permit.

19 5. Provision C.1

20 Amador's second claim alleges violation of Provision
21 C.1, which states in relevant part: "Permittees shall implement
22 controls as required by this Order to reduce the discharge of
23 pollutants from their MS4s to waters of the U.S. to the MEP
24 [maximum extent practicable]." (Small MS4 Permit § C.1.) "The
25 MEP standard requires Permittees to apply Best Management
26 Practices (BMPs) that are effective in reducing or eliminating
27 the discharge of pollutants to the waters of the U.S." (Small
28 MS4 Permit ¶ 38.) "BMP development is a dynamic process and may

1 require changes over time as the Permittees gain experience
2 and/or the state of the science and art progresses. To do this,
3 the Permittees must conduct and document evaluation and
4 assessment of each relevant element of its program, and their
5 program as a whole, and revise activities, control measures/BMPs,
6 and measurable goals, as necessary to meet MEP." (Id.) "MEP is
7 the cumulative effect of implementing, evaluating, and making
8 corresponding changes to a variety of technically appropriate and
9 economically feasible BMPs, ensuring that the most appropriate
10 controls are implemented in the most effective manner."

11 (Attachment I at 4.) This process of "implementing, evaluating,
12 revising, or adding new BMPs is commonly referred to as the
13 iterative process." (Id. (emphasis added).)

14 Defendants contend that they engaged in the iterative
15 process and point to implemented BMPs, including informational
16 memoranda to Mule Creek State Prison staff regarding the
17 stormwater prevention program; "fabric, wattles, designed v-
18 ditches to catch sediment from runoff, and paved aprons to filter
19 or reduce contaminants in discharges"; curbs that redirect non-
20 stormwater flows to appropriate drainage areas; various
21 materials- and waste-management practices; and the installation
22 of a permanent monitoring station at MCSP2 and MCSP3. (See Decl.
23 of Anthony Orta (Docket No. 95-4) ¶¶ 8-13.) Defendants also
24 point to the Small MS4 Permit Annual Reporting, which "documents
25 and assesses the Small MS4 Permit program elements." (Defs.' SUF
26 ¶ 29.)

27 Amador contends that defendants did not engage in the
28 iterative process and points to notices from the regional water

1 board concerning defendants' receiving water BMPs. In February
2 2022, the regional water board notified defendants that due to
3 exceedances of water quality standards, they were required to
4 provide the board with "[BMPs] to be implemented to address the
5 receiving water exceedances and a schedule of the BMP
6 implementation." (Amador Ex. 5, Comments to the Phase II MS4
7 Annual Reports and 13383 Order Quarterly Monitoring Reports (Feb.
8 11, 2022) ("Feb. 2022 Comments") (Docket No. 97-4 at 16-20) at
9 2.) The board also stated that "BMPs which can immediately
10 address the exceedances must be proposed and immediately
11 implemented." (Id.)

12 In November 2022, the board notified defendants that
13 they had failed to comply with its previous requirement to
14 implement BMPs addressing the receiving water's exceedance of
15 water quality standards. (Amador Ex. 6, Clarification to the
16 Comment Letter Dated 11 February 2022 (Nov. 3, 2022) (Docket No.
17 97-4 at 21-31) at 2.) Specifically, while defendants identified
18 BMPs related to irrigation water, they failed to implement BMPs
19 addressing aluminum and zinc despite exceedances of aluminum and
20 zinc water quality objectives. (Id. at 3.) The board's findings
21 align with the testimony of Paul Orta (who was responsible for
22 managing BMPs) that he was only aware of BMPs designed to "reduce
23 sediment," not to address any other pollution issues. (See (CSPA
24 Ex. 2, Dep. of Paul Orta ("Orta Dep.") (Docket No. 96-2 at 47-72)
25 at 98.) This evidence establishes a question of fact as to
26 whether defendants implemented BMPs to address all known water
27 quality issues.

28 Amador also contends that defendants have failed to

1 evaluate and update some of the cited BMPs since the initiation
2 of this action. For instance, the bioswales were in place prior
3 to January 14, 2019 and were not updated after that date. (Orta
4 Dep. at 97). Mr. Orta testified that while some measures had
5 been evaluated for effectiveness (see id. at 111), he was unsure
6 if others--including the bioswales--had been evaluated (see id.
7 at 98). Further, although defendants were aware of multiple
8 necessary repairs to the stormwater and sewer systems--repairs
9 that Mr. Orta classified as BMPs--defendants had not made any of
10 those repairs as of August 2022. (Orta Dep. at 114.) This
11 evidence establishes a question of fact as to whether defendants
12 evaluated and made appropriate changes to their BMPs as they
13 gained knowledge and experience, which is central to the
14 iterative process. (See Small MS4 Permit ¶ 38; Attachment I at
15 4.) It is not sufficient to merely implement some BMPs;
16 defendants must "evaluate" and "revise" their BMPs, possibly
17 adding additional BMPs over time, to "ensure that the most
18 appropriate controls are implemented in the most effective
19 manner." (See Attachment I at 4.)

20 The court therefore finds that there is a genuine issue
21 of material fact as to whether defendants engaged in the
22 iterative process. Accordingly, the court will deny summary
23 judgment as to Amador's second claim to the extent it alleges
24 violation of Provision C.1 of the Small MS4 Permit.

25 6. Provision D

26 Both plaintiffs' second claims allege violations of
27 Provision D. This provision, titled Receiving Water Limitations,
28 states: "Discharges shall not cause or contribute to an

1 exceedance of water quality standards contained in a Statewide
2 Water Quality Control Plan, the California Toxics Rule (CTR), or
3 in the applicable Regional Water Board Basin Plan.” (Small MS4
4 Permit § D.) Provision D further provides that defendants will
5 timely implement “control measures/BMPs and other actions to
6 reduce pollutants in the discharges and other requirements of
7 this Order including any modifications,” and outlines procedures
8 for such implementation. (Id.)

9 a. Sufficiency of Data

10 Defendants contend that plaintiffs’ data does not
11 account for “background” sources--i.e., upstream and non-human
12 sources of contaminants⁵--and is therefore insufficient to
13 establish exceedances of the Basin Plan’s water quality
14 standards. In support of this argument, defendants cite two
15 excerpts of guidance relating to the Basin Plan water quality
16 standards.⁶

17 The State Water Resources Control Board’s Water Quality
18

19 ⁵ Defendants identify animal waste from cattle ranches,
20 birds, and deer, and naturally occurring metals in upstream soil
as possible background contributors. (Mot. at 21.)

21 ⁶ Defendants seem to argue that background contributions
22 are relevant in determining violations of all provisions of the
23 Small MS4 Permit. However, defendants’ arguments pertain only to
24 the Basin Plan’s water quality standards, which are relevant to
Provision D but not to any other provisions at issue.

25 Defendants also cite expert testimony and various non-
26 binding regulatory sources for the proposition that background
27 sources are considered as a matter of general practice when
evaluating sampling data. However, the issue as framed by
28 defendants is whether the Small MS4 Permit requires exclusion of
background to establish an exceedance, not whether background is
typically considered in the field. (See Mot. at 20.)

Standards Variance Policy provides in relevant part: "In the context of a TMDL [total maximum daily load] or a BASIN PLAN amendment developed to implement the BACTERIA WATER QUALITY OBJECTIVES, a natural source exclusion approach may be utilized after all anthropogenic sources of bacteria are identified, quantified, and controlled." (Defs.' Ex. D, Part 3 of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California – Bacteria Provisions and Water Quality Standards Variance Policy (Docket No. 95-8 at 1-10) at 5.) The Policy then states that in circumstances where there is a naturally occurring background concentration of bacteria, the relevant total maximum daily load or Basin Plan amendment can account for that natural background by allowing some exceedance of water quality objectives. (See id.) This language does not require exclusion of background sources in determining violations, but merely presents natural source exclusion as one possible approach that regulators can take in crafting a total maximum daily load or Basin Plan amendment.⁷

Defendants next point to guidance in the Basin Plan, which provides in relevant part:

Numerical receiving water limitations will be established in Board orders for constituents and parameters which will, at a minimum, meet all applicable water quality objectives. However, the water quality objectives do not require improvement over naturally occurring background concentrations. In cases where the natural background concentration of a particular constituent exceeds an applicable water quality objective, the natural background concentration will be considered to comply with the objective.

⁷ As discussed above, there is no Basin Plan amendment applicable to Mule Creek.

1 (Basin Plan at 4-27.) This language is part of guidance
2 explaining the regional water board's "[c]onsiderations" in
3 carrying out control actions, which range from surveying and
4 monitoring to remedial measures including NPDES permits,
5 discharge prohibitions, and Cease and Desist and Cleanup and
6 Abatement orders. (See id. at 4-10, 4-21.)

7 While this guidance indicates that the regional water
8 board may consider background in taking various regulatory
9 actions, it does not establish that the permit requires exclusion
10 of background sources to demonstrate an exceedance of water
11 quality standards. Crucially, the Basin Plan's water quality
12 objectives do not require consideration of background. (See
13 Basin Plan at 3-3 to 4-1.) Provision D incorporates only the
14 Basin Plan's water quality standards, not other guidance
15 contained in the plan. (See Small MS4 Permit § D.) See also
16 NRDC II at 1199 (explaining that permit provision prohibiting
17 "discharges from the MS4 that cause or contribute to the
18 violation of the Water Quality Standards or water quality
19 objectives" incorporates the basin plan's "standards" and
20 prohibits discharges that cause or contribute to the violation
21 "of those incorporated standards") (emphasis added).

22 A report from the regional water board rejected
23 defendants' suggestion that background sources were relevant in
24 determining exceedances of the Basin Plan water quality objective
25 applicable to fecal coliforms. (See Pls.' Ex. 21, Review of
26 Revised Storm Water System Investigation Findings Report (Docket
27 No. 45-20 at 59-80) at 8.) The report explains that while
28 "[coliform bacteria] can come from many sources other than human

1 waste, it is important to note that the Basin Plan Water Quality
2 Objective . . . does not specify that the limit is restricted to
3 human sources. Fecal coliforms, regardless of source, are
4 subject to this Water Quality Objective.” (Id.) This
5 explanation from the regional water board confirms that the
6 language of the applicable water quality objectives--which do not
7 require consideration of background--determines whether
8 violations have occurred. See NRDC II at 1207 (giving
9 “significant weight” to regional water board’s rejection of
10 defendants’ position because “intent of the permitting authority”
11 is relevant to permit interpretation, even where permit’s
12 language is unambiguous).

13 While background data is not necessary to establish an
14 exceedance of the water quality standards, it may be relevant in
15 determining whether defendants’ discharges “caused or contributed
16 to” an exceedance under Provision D. (See Decl. of Timothy
17 Simpson (Docket No. 95-5) ¶¶ 17-24.) There is sufficient
18 evidence to establish a question of material fact as to whether
19 an exceedance is attributable to defendants, not to background
20 sources. (See, e.g., Defs.’ Ex. A to Decl. of Alanna Lundgren
21 (“Lundgren Decl.”), Quantification of Sources of Fecal Pollution
22 at Mule Creek (Jan. 2021) (Docket No. 95-3 at 4-40) at ii
23 (stating that one-third of E. coli sampling data collected showed
24 that “the concentration increase moving past the prison property
25 was sufficient to cause a downstream water quality standard
26 exceedance where the upstream sample was in compliance”); CSPA
27 Ex. 22, Review of Revised Storm Water System Investigation
28 Findings Report (Docket No. 96-4 at 1-22) at 17 (stating that

1 there is "strong evidence that wastewater of some sort is
2 entering the system," indicating that "discharges from the
3 stormwater system have impacted, and threaten to continue to
4 impact, Mule Creek"); Ex. B to Lundgren Decl., Revised Stormwater
5 Collection System Investigation Report of Findings (June 2020)
6 (Docket No. 95-3 at 41-168) at 88 (indicating that while
7 exceedances of aluminum, iron, and magnesium were likely
8 naturally occurring, zinc exceedances were attributable to
9 industrial materials at defendants' facility). Further, despite
10 the sources cited by defendants suggesting that the regional
11 water board may consider background, the board nonetheless
12 required defendants to take remedial actions in response to
13 exceedances of water quality standards. (See, e.g., Feb. 2022
14 Comments at 2.) Accordingly, the court finds that the issue of
15 possible background sources does not warrant summary judgment on
16 plaintiffs' second claims as to Provision D.

17 Defendants also point out, as discussed above, that the
18 Basin Plan's water quality objectives apply to the receiving
19 water (i.e., Mule Creek), not to discharges. Defendants'
20 argument on this point is unclear. They first seem to argue that
21 plaintiffs solely rely on sampling data from discharges at MCSP2,
22 MCSP3, MCSP5, and MCSP6 and therefore cannot establish that the
23 receiving water exceeded water quality objectives. (Defs.' Reply
24 at 8.) Defendants later state that plaintiffs rely on samples
25 from MCSP4 (which is located within Mule Creek). (Id. at 18.)

26 At any rate, plaintiffs rely not only on discharge
27 sampling data from the outfalls, but also sampling data from Mule
28 Creek. (See CSPA Opp'n at 15; Amador Opp'n at 14.) For

1 instance, plaintiffs point to sampling data collected from
2 February 2019 to January 2021 at MCSP4 indicating that samples
3 from Mule Creek exceeded water quality standards for E. coli and
4 metals. (See CSPA Ex. 1, Decl. of Karen Ashby (Docket No. 45-4)
5 at 11-13). The combination of sampling data from defendants'
6 discharges and from within Mule Creek is sufficient to establish
7 a question of fact as to whether defendants' discharges caused or
8 contributed to an exceedance of water quality standards in Mule
9 Creek. See NRDC II at 1204, 1210 (holding that defendants'
10 discharges caused or contributed to exceedance of basin plan
11 water quality standards based on sampling data from receiving
12 water where defendants discharged pollutants at issue to
13 receiving water); McClellan Ecological Seepage Situation (MESS)
14 v. Weinberger, 707 F. Supp. 1182, 1203 (E.D. Cal. 1988), vacated
15 on other grounds McClellan Ecological Seepage Situation v. Perry,
16 47 F.3d 325 (9th Cir. 1995) (finding question of fact as to
17 whether defendants "caused" exceedance of receiving water
18 limitations where data showed exceedances in the receiving water
19 and in defendants' discharges). Accord Cal. Sportfishing Prot.
20 All. v. River City Waste Recyclers, LLC, 205 F. Supp. 3d 1128,
21 1151 (E.D. Cal. 2016) (Mueller, J.) (finding that discharges in
22 exceedance of water quality standards "cause[d] or contribute[d]
23 to an exceedance of any applicable water quality standards");
24 Cal. Sportfishing Prot. All. v. Chico Scrap Metal, 124 F. Supp.
25 3d 1007, 1020-22 (E.D. Cal. 2015) (Burrell, J.) (same).

26 Defendants also argue that plaintiffs cannot establish
27 that any exceedance of water quality standards was solely
28 attributable to defendants. (Mot. at 23.) This argument is

1 unsupported by the plain language of the permit, which states
2 that discharges shall not “cause or contribute” to an exceedance
3 of water quality standards. (See Small MS4 Permit § D (emphasis
4 added).) Defendants do not point to any language in the Small
5 MS4 Permit, Basin Plan, or other authority suggesting that
6 exceedances must be solely attributable to defendants to
7 establish a violation of Provision D.

8 b. Section 303(d) List

9 Defendants argue that because Mule Creek has not been
10 included on the State Water Board’s Section 303(d) list,
11 plaintiffs cannot prove that Mule Creek exceeded water quality
12 standards under Provision D. However, defendants have not
13 identified any language in the permit--or any other authority--
14 indicating that being placed on the 303(d) list is necessary to
15 find a violation of Provision D. Further, the standards for
16 being 303(d)-listed and for violating Provision D are not
17 coextensive. Waterbodies with “chronic or recurring monitored
18 violations” are included on the 303(d) list. (See Attachment I
19 at 3.) In contrast, Provision D requires only an “exceedance” of
20 water quality standards. (Small MS4 Permit § D.)

21 c. Iterative Process

22 Defendants argue that because they have engaged in the
23 iterative process, they cannot be liable under Provision D.
24 (Mot. at 32.) As discussed above, there is a question of fact as
25 to whether defendants engaged in the iterative process.
26 Regardless, the language of Provision D does not provide that
27 engaging in the iterative process excuses defendants from
28 liability. Provision D lays out two separate requirements:

1 first, that discharges not exceed water quality standards, and
2 second, that defendants implement measures to control any
3 exceedances. (See Small MS4 Permit § D.)

4 The regional water board has explained that, with
5 respect to receiving water limitations like Provision D, “the
6 iterative process does not provide a ‘safe harbor’ to MS4
7 permittees.” (See MS4 Fact Sheet at 22.) “When a discharger is
8 shown to be causing or contributing to an exceedance of water
9 quality standards, that discharger is in violation of the
10 relevant discharge prohibitions and receiving water limitations
11 of the permit and potentially subject to enforcement . . . , even
12 if the discharger is actively engaged in the iterative process.”
13 (Id.) Similarly, in NRDC I, the Ninth Circuit held that the
14 iterative process did not provide a “safe harbor” for violations
15 because the permit language did not support that interpretation,
16 and because the iterative process is not intended to “absolv[e]
17 noncompliance.” 673 F.3d at 897.

18 Accordingly, the court will deny summary judgment on
19 plaintiffs’ second claims to the extent they allege violations of
20 Provision D of the Small MS4 Permit.

21 C. Violations of Industrial General Permit

22 Only Amador’s third claim alleges violation of the
23 Industrial General Permit. (See Amador FAC ¶¶ 113-22.) Amador
24 indicates that it “withdraw[s] the third cause of action for
25 discharges in violation of the Industrial General Permit” and
26 “will no longer pursue this claim.” (Amador Opp’n at 8-9.) The
27 court will therefore grant defendants’ motion for summary
28 judgment on Amador’s third claim.

1 IT IS THEREFORE ORDERED that defendants' motion for
2 summary judgment (Docket No. 95) be, and the same hereby is,
3 GRANTED as to Amador's first claim, to the extent it alleges
4 violations resulting from operation of the land application
5 areas; GRANTED as to CSPA's second claim and Amador's second
6 claim, to the extent they allege violations of Provision B.1 of
7 the Small MS4 Permit; and GRANTED as to Amador's third claim.
8 Summary judgment is DENIED in all other respects.

9 Dated: January 10, 2023



10 WILLIAM B. SHUBB
11 UNITED STATES DISTRICT JUDGE
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28